KMA MARKETING SDN BHD

v.

MBF LEASING SDN BHD; KIONG HUAT TRANSPORT & ENGINEERING CONSTRUCTION & ANOR (THIRD PARTIES)

HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-39-1999]
26 NOVEMBER 2007

CIVIL PROCEDURE: *Execution - Stay - Judgment - Winding-up - Special circumstances - Recovery of payment - Scheme of arrangement - Fruits of litigation theory - Nugatoriness*

CIVIL PROCEDURE: *Judgments and orders - Stay of execution - Winding-up - Special circumstances - Recovery of payment - Scheme of arrangement - Fruits of litigation theory - Nugatoriness*

This was an application by the defendant to stay the execution of a judgment - based upon which the plaintiff issued a notice to wind-up the defendant - granted by the High Court after trial of the action. The defendant contended that: (i) the commencement of winding-up proceedings against it would unduly prejudice the defendant's business and also adversely affect the jobs of the defendant's employees; (ii) its appeal to the Court of Appeal would be severely prejudiced and likely to be rendered nugatory if it were wound-up; and (iii) in the event the plaintiff executed and received payment under the judgment in this action, the plaintiff would not be in a financial position to return the money to the defendant if the appeal were allowed.

Held (allowing the application):

(1) A stay ought to be granted, the reasons being as follows: (a) from a reading of the affidavits, this court was satisfied that the defendant had demonstrated special circumstances to consider and, if deem fit, to grant a stay with or without any terms; (b) from the evidence adduced, there was a real threat that if the payment were made to the plaintiff there was a likelihood that in the event the defendant succeeded he may not be able to recover the sum. In fact, the plaintiff had stated that since the primary concern of the defendant was

A the fear that it may not recover the money paid, this court was at liberty to order the defendant to pay into a trust account held by the plaintiff or its solicitor pending the outcome of the appeal; (c) the defendant was under restructuring *vide* a scheme of arrangement with its creditors
B pursuant to s. 176(3) of the Companies Act 1965 ('Act'). In the event the stay were not granted and the defendant were wound-up, this would unduly affect and prejudice the scheme and other creditors of the defendant under the scheme; (d) the plaintiff, by issuing a winding-up notice, had shown a
C clear intention to stand as an unsecured creditor as opposed to fully enjoying the fruits of litigation to the exclusion of other creditors. More so in this case when the plaintiff had knowledge that the defendant was going through an arrangement under s. 176(3) of the Act. In such
D circumstances and facts, the plaintiff should not be allowed to canvass the "fruits of litigation" theory when the plaintiff, by its own conduct, was prepared to eat humble pie. (para 6)

(1a) The "fruits of litigation" theory would not apply when the
E judgment creditor, on his own accord, had filed a winding-up petition or bankruptcy proceeding purely for the purpose of putting pressure on the judgment debtor when there was clear evidence that the judgment sum could not be realized in full. In such circumstances, the court would more readily grant the
F stay. This *per se* could stand as one of the special circumstances why the stay should be granted. (para 7)

Case(s) referred to:

Ayer Molek Rubber Co Bhd & Ors v. Insas Berhad & Anor [1995] 3 CLJ 359 CA ***(refd)***

G *Dickson Trading (S) Pte Ltd v. Transmarco Ltd [1984] 2 MLJ 408* ***(refd)***

Hong Leong Finance Bhd v. Hon Hoi Weng & Ors [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 HC ***(refd)***

Insas Bhd & Anor v. Ayer Molek Rubber Company Bhd & Ors [1995] 3 CLJ 328 FC ***(refd)***

H *Insas Bhd & Anor v. Raphael Pura [1999] 4 CLJ 784 HC* ***(refd)***

Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Berhd [2000] 3 CLJ 361 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Berhad [2003] 4 CLJ 1 FC ***(refd)***

Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***

I *Matang Holding Bhd & Ors v. Dato Lee San Choon & Ors [1985] 2 MLJ 406* ***(refd)***

Re Kong Thai Sawmill [1976] 1 MLJ 131 ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Serangoon Garden Estates Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***
Walter Pathrose Gomez & Ors v. Sentul Raya Sdn Bhd [2005] 7 CLJ 385 HC ***(refd)***
Wilson v. Church (No 12) [1879] 12 Ch D 454 ***(refd)***
Yin Shen [1986] 2 MLJ 65 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 176(3)
Courts of Judicature Act 1964, ss. 44, 73

For the plaintiff - George Lim; M/s Battenberg & Talma
For the defendant - Stephen Chung; M/s Stephen Robert & Wong

Reported by Suresh Nathan

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the defendant's application to stay the execution of judgment granted by Justice Linton Albert on 17 November 2006 after trial of the action.

Brief Facts

[2] The defendant says (i) the plaintiff have issued a notice to wind up the company based on the judgment. (ii) the defendant is in the leasing and hire-purchase business. It is an on-going business concern owned by a group of employees *via* a management buy out completed in July 2006. The defendant has three (3) offices in Malaysia, at Kuala Lumpur, Penang and Kuching, employing thirty-three (33) employees. (iii) in the event winding-up proceedings are commenced against the defendant, it will unduly prejudice the defendant's business and operations, including existing leasing and hire-purchase agreements. It will also unduly affect and prejudice debt collections and court cases which are pending in the different courts in Malaysia. The defendant will have to apply for consents from the official receiver's office to continue with its current cases, resulting in extra costs and delays to the court proceedings. (iv) any winding-up proceedings would result in the jobs of the employees of the defendant being affected, causing undue hardships to the employees and their families. (v) in the event the defendant is wound-up, the defendant

A has to apply for the consent of the official receiver's office to continue with the appeal to the Court of Appeal. The defendant's appeal to the Court of Appeal will be severely prejudiced and likely to be rendered nugatory. (vi) The balance sheet of the plaintiff as at 30 June 2006 shows current liabilities of RM50,481,794, total B assets of minus RM13,620,628 and share premiums and reserves of minus RM20,359,638. The profit and loss account shows a net loss after taxation of RM3,899,305 and accumulated losses of RM20,718,202. (vii) In the event the plaintiff executes and receives payment under the judgment in this action, it would not C be in a financial position to return the money to the defendant if the appeal is allowed.

Law On Stay Of Execution

D **[3]** The law of stay of execution as it stands has developed in a manner that the statutory right of appeal is not recognized neither much thought is given to the Federal Constitution and the presence of the appellate court to address appeals and to be the final arbiter of dispute. Such state of affairs has created much E controversies and unfair prejudice, to litigants and thereby often embarrassed decision making process of trial courts. (See *Ayer Molek Rubber Co Bhd & Ors v. Insas Bhd & Anor* [1995] 3 CLJ 359; *Insas Berhad & Anor v. Ayer Molek Rubber Company Berhad & 10 Ors* [1995] 3 CLJ 328; *Insas Berhad & Anor v. Rapheal Pura* [1999] 4 CLJ 784; *Insas Bhd & Anor Ayer Molek Rubber Co Bhd* F *& Ors* [1995] 3 CLJ 328). My reasons are as follows:

(a) Stay in procedural law generally means an order of court temporarily restraining a previous order of court or proceeding as the case may be. There are many types of stay. For G example, stay of proceedings, execution, declaratory orders, stay under s. 44 of the Courts of Judicature Act and stay of writ of seizure and sale. The principles of law and practice granting stay in various types of stay application are not uniform and/or governed by statute. For example, the principle H of law enunciated by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & 2 Ors v. Koperasi Serbausaha Makmur Berhad* [2003] 4 CLJ 1 does not apply to all types of stay. Section 73 of the Courts of Judicature Act 1964 states that an appeal shall not operate as a stay of execution or of proceeding I under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or

proceedings shall be invalidated except so far as the Court of Appeal may direct. It is a cardinal rule that where a party is exercising his right of appeal, the court ought to ensure that the appeal, if successful, is not nugatory. This rule is based on logic and common sense. (See *Wilson v. Church (No. 12)* [1879] 12 Ch. D 454). However, the scope of this rule has vastly been restricted by judicial fetters rather than rules of the court. (See *Yin Shen* [1986] 2 MLJ 65).

(b) Presently, for an application for stay to succeed, the applicant must show special circumstances. The court has an unqualified discretion to grant a stay of execution. It has never been the practice of the court to grant a stay unless the application is supported by an affidavit of special circumstances. As a rule, the court will only grant stay if there are special circumstances. (See *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406; *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86). (In *Serangoon Garden Estates Ltd v. Ang Keng* [1953] MLJ 116), Brown J stated that the granting of stay of execution, though discretionary, should be exercised on correct principles. The court stated that the fact that the defendant cannot be restored to his original position if his appeal succeeds is not a sufficient ground though it might be an important factor to be taken into consideration if there were other grounds, for example that there were merits in the appeal. Further, His Lordship asserted that it is a clear principle that the court will not deprive a successful party of the fruits of his litigation until it is determined that the unsuccessful party can show special circumstances to justify it. This case was distinguished in *Dickson Trading (S) Pte Ltd v. Transmarco Ltd* [1984] 2 MLJ 408. I take the view the decision of *Serangoon Garden* was not in reliance of statute or rules of procedure. It was the court's own innovation to create fetters when there is no such legislative intention. In *Re Kong Thai Sawmill* [1976] 1 MLJ 131 the Federal Court stated that stay of execution pending appeal is granted only where exceptional circumstances are proved, such as for instance, where execution would destroy the subject matter of the action or deprive the appellant the means of prosecuting the appeal by reason of poverty. Further, the court stated that allegations that there have been misdirection in the judgment against the weight of evidence, or that there was no evidence to support the judgment are not special circumstances on which the court will grant the stay.

A It is arguable that the Federal Court's decision was not based on sound statutory provision or rules of procedure. It has attempted to establish a common law principle in breach of provision in the statute which recognize the statutory right of appeal. In *Matang Holding Bhd & Ors v. Dato Lee San Choon*
B *& Ors* [1985] 2 MLJ 406, it was stated that an appeal to the higher courts is not such ground as to constitute special circumstances unless there are merits in the appeal. The court observed that special circumstances must constitute something distinctive and out of the way. The court asserted that it
C would not deprive a successful party of the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances to justify it. I take the view that (all things being equal) the rule as to special circumstances places unnecessary judicial fetters on the right
D to appeal. The real issue which will relate to substantive issue is for the court to see whether the litigant will have any merit to succeed in his appeal rather than forcing the appellant to show special circumstances more so when he has an absolute right to appeal which has not yet been exhausted.

E

(c) In *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors* [1987] 2 CLJ 227; [1987] CLJ (Rep) 656, it was stated that in respect of applications for stay pending appeal, a distinction has to be drawn between a matter that was decided upon after full trial
F and enquiry and one summarily arrived at by a senior assistant registrar. VC George J (as His Lordship then was) observed that although the instance of the former case requires the special circumstances to be quoted, in the latter, the fact that the presumptions are in support of the appeal is sufficient
G ground to grant the stay pending appeal. The decision of His Lordship is most welcoming. The learned judge, on the facts and with a view to render every opportunity to the meritorious argument of the litigant, admirably distinguished the previous cases which echoed 'special' circumstances' as a
H criteria for stay, as one where the stay was sought in respect of judgments given after a full trial. This phrase in its true logic will apply to the subordinate courts and to some extent to the High Court.

I (d) In *See Teow Guan & 1 Ors v. Kian Joo Holdings Sdn Bhd & 3 Ors* [1997] 2 CLJ 299 (hereinafter referred to as *See Teow Guan*) the Court of Appeal stated that in the past, it was thought that the appellant has to demonstrate special

circumstances warranting a stay so as not to deprive a successful litigant of 'the fruits of his litigation'. Further, the court stated that in light of recent decisions, (the judge referring to English cases) the decision in *Serangoon Garden*, which has been faithfully relied on as the authority for such a proposition, is no longer good law. The court asserted that in an application for a stay of execution or of proceedings, a more practical, flexible, realistic and less stringent approach should be adopted and the paramount consideration is whether the appeal would be rendered nugatory if a stay were not granted. Further, the court observed that if the Court of Appeal, after balancing all relevant factors, concludes that an appeal would be rendered nugatory if the stay or other interim preservation order is not granted, the court should direct a stay or grant other appropriate interim relief, which will effectively maintain the *status quo*. Further, the court stated that if the Court of Appeal concludes that the point in the pending appeal is obviously unarguable, it would not be a proper exercise of the court's discretion if the court nevertheless proceeds to grant a stay.

(e) The above decision is most gratifying as it demolishes the 'special circumstances rule' and recognises the statutory right of appeal though in a restricted sense. It must be emphasized that after the decision of *See Teow Guan* many High Courts refused to follow the decision of the Court of Appeal and attempted to diminish the value of the principles enunciated for stay in *See Teow Guan*. (See *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Berhd* [2000] 3 CLJ 361).

(f) A middle approach has been stated in the recent Federal Court's decision in *Kosma Palm* (*supra*) without endorsing the decision of *See Teow Guan*. In the *Kosma Palm* case it was contended, in an application for stay of execution, special circumstances or nugatoriness need not be shown. However, the Federal Court asserted that the onus was on an applicant to demonstrate the existence of special circumstances to justify the grant of a stay of execution and the reasons must relate to the enforcement of the judgment and the merits of the party's case in a stay application was not a relevant matter for consideration. Further, the court stated that there were many factors that might constitute special circumstances, and

A the fact that an appeal would be rendered nugatory if the stay were refused, was the most common example of special circumstances. The court took the view that any attempt to restrict the grant of a stay of execution to nugatoriness was wrong and would severely restrict the grounds on which an B applicant might rely.

(g) It is trite that a right to appeal to the Court of Appeal is an entrenched constitutional right. That being the case, fetters like the 'special circumstances rule' must be done away with, C as it does not accord with the spirit of the constitution. Cases on special circumstances rule which do not consider the constitutional aspect must be treated as *per incuriam*. The previous decisions of court, which relied on English cases, must be rejected, as our constitutional provision is not similar D to the position in England. It is clear that all decisions are subject to appeal. A decision in practical terms cannot be said to be final where a matter is on appeal, until the final appellate court delivers its matured decision. When every decision of court is made appealable expressly by Act of Parliament and E where no provisions of the Act or rules specifically require the court to place fetters on the right of appeal, that the so called 'special circumstance' does not support legislative intention. It is trite that procedural jurisprudence will not allow one to be so spell bound by English precedent and fail to appreciate the F rationale of our Acts, rules and constitutional guarantees and create hardship to the appellant. If the intention of parliament is clear that there is a right of appeal then judicial fetters cannot be allowed to prevail. I take the view that the court should do away with special circumstances rule. If it is desired G that special circumstances should exist then appropriate amendments should be made to the Federal Constitution, Courts of Judicature Act 1964 and the Subordinate Courts Act 1948 and to the rules of the court. Now the decision of the Court of Appeal in *See Teow Guan* is most enlightening and H reflects the contemporary thinking in United Kingdom and other jurisdictions. However, the Federal Court in *Kosma Palm* did not endorse the Court of Appeal's decision though to some extent the decision paves a flexible approach.

I **[4]** The present position of law is as stated in *Kosma*'s case. The decision of the appellate court has given wide latitude to the trial court to grant the stay and has not confined the criteria to

cases such as *Serangoon Garden* (*supra*) or widen the scope as propounded by the court of Appeal in *See Teow Guan* (case). In *Kosma Palm Oil Mill Sdn Bhd & 2 Ors v. Koperasi Serbausaha Makmur Berhad* it was contended that in an application for stay of execution special circumstances or nugatoriness need not be shown. Augustine Paul JCA sitting in he Federal Court made the following observations:

> (a) The merits of a party's case in a stay application was not a relevant matter for consideration. (b) The onus was on an applicant to demonstrate the existence of special circumstances to justify the grant of a stay of execution and the reasons must relate to the enforcement of the judgment of the appeal. (c) There were many factors that might constitute special circumstances and the fact that an appeal would be rendered nugatory if the stay were refused was the most common example of special circumstances. (d) Any attempt to restrict the grant of a stay of execution to nugatoriness was wrong and would severely restrict the grounds on which an applicant might rely. (e) As the applicants had not put forward reasons that related to the enforcement of the judgment of the appeal but instead had focused on the problems that the applicants would encounter if the motion were not successful, they failed to raise special circumstances which warrant a stay of execution.

[5] *En passant* I will say it is always necessary and essential to ensure judicial propriety of the highest order is maintained, to subject all judgments of the court of the first instance to appellante jurisdiction. For this reason alone the special circumstances rule in the interest of justice, transparency and accountability must be abolished in toto. (See *Ayer Molek Rubber Co Bhd & Ors v. Insas Bhd & Anor* [1995] 3 CLJ 359; *Insas Berhad & Anor v. Ayer Molek Rubber Company Berhad & 10 Ors* [1995] 3 CLJ 328; *Insas Berhad & Anor v. Raphael Pura* [1999] 4 CLJ 784; *Insas Bhd & Anor v. Ayer Molek Rubber Co Bhd & Ors* [1995] 3 CLJ 328).

[6] I have read the application, affidavit and the submission of the parties in detail. I take the view that a stay ought to be granted. My reasons are as follows:

(i) From the reading of the affidavits I am satisfied that the defendant has demonstrated special circumstances to consider and if deem fit to grant a stay with or without any terms.

A (ii) In this case from the evidence adduced there is a real threat that if the payment is made to the plaintiff there is likelihood that in the event the defendant is successful he may not be able to recover the sum. In fact the plaintiff in their submission have stated that since the primary concern of the defendant
B here is that there is the fear that it may not recover the money paid then this court is at liberty to order the defendant to pay into a trust account held by the plaintiff or its solicitor pending the outcome of the Appeal. (See *Walter Pathrose Gomez & Ors v. Sentul Raya Sdn Bhd* [2005] 7 CLJ 385).

C (iii) Further, in this case it has been brought to the attention of court that the defendant is under restructuring *vide* a scheme of arrangements with its creditors pursuant to s. 176(3) of the Companies Act. In the event the stay is not granted and the
D defendant is being wound-up, this will unduly affect and prejudice the scheme and other creditors of the defendant under the scheme.

(iv) The plaintiff by issuing a winding-up notice has shown a clear intention to stand as an unsecured creditor as opposed to
E fully enjoying the fruits of litigation to the exclusion of other creditors. More so in this case when the plaintiff has knowledge the defendant is going through a s. 176(3) CA 1965 arrangement. In such circumstances and facts the
F plaintiff should not be allowed to canvass the "fruits of litigation" theory when the plaintiff by their own conduct is prepared to eat a humble pie.

[7] It is my judgment that the "fruits of litigation" theory will not apply when the judgment creditor by his own accord had filed
G a winding up petition or bankruptcy proceeding purely for the purpose of putting pressure to judgment debtor when there is clear evidence that the judgment sum cannot be realized in full and that too by a long and cumbersome procedure. In such circumstances the court will more readily grant the stay. This
H *per se* can stand as one of the special circumstances, why the stay should be granted.

[8] For reasons stated above I grant the stay with costs. The getting up fees shall not exceed RM5,000. If costs cannot be
I agreed the defendant is at liberty to tax his costs.